

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARK ALLEN SILVA,

Plaintiff,

v.

BRETT CURTWRIGHT, KELLY
WICHERT, DEPARTMENT OF
CORRECTIONS, LEWIS COUNTY JAIL
STAFF, ALAN HONCIR, CO NUSS,

Defendants.

No. C13-5938 RJB/KLS

ORDER TO SHOW CAUSE

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff has been granted leave to proceed *in forma pauperis*. The Court has reviewed Plaintiff's civil rights complaint (ECF No. 9) but declines to serve the complaint because it is deficient. ECF No. 9. Plaintiff shall show cause why this case should not be dismissed.

DISCUSSION

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998). A complaint is legally frivolous when it

1 lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v.*
2 *Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984).

3 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (i) the conduct
4 complained of was committed by a person acting under color of state law and (ii) the conduct
5 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the
6 United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 687 L.Ed.2d 420 (1981),
7 *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the
8 appropriate avenue to remedy an alleged wrong only if both of these elements are present.
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10 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

11 On the basis of these standards, Plaintiff has failed to state a claim upon which relief can
12 be granted. Plaintiff purports to sue Brett Curtwright, a community corrections officer; Kelly
13 Wichert, a DOC Hearing Officer; the Department of Corrections; and Lewis County Jail Staff,
14 including CCO Alan Honcir and CO Nuss. ECF No. 9. Plaintiff alleges that during a
15 community custody hearing, he agreed to 25 days confinement in the Lewis County Jail. He
16 claims that Lewis County Jail Staff released him before his confinement was complete even
17 though he told the booking officers that he was not supposed to be released. When he did not
18 report upon release to his community corrections officer, a warrant was issued for his arrest.
19 Plaintiff claims that he felt threatened by his community corrections officer when he telephoned
20 the day after his release. Plaintiff was apprehended and returned to the Lewis County Jail for a
21 total of twenty days (10 days outstanding on his original sentence and 10 days sanction). *Id.* at
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25 Plaintiff's challenge to his current conviction for violation of the terms of his community
26 custody are likely barred in this 42 U.S.C. § 1983 proceeding. *See Heck v. Humphrey*, 512 U.S.

1 477, 489 (1994). Pursuant to *Heck*, a § 1983 claim that calls into question the lawfulness of a
2 plaintiff's conviction or confinement does not accrue "unless and until the conviction or sentence
3 is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus"); *see*
4 *also Edwards v. Balisok*, 520 U.S. 641, 646 (1997) (concluding that a § 1983 claim was not
5 cognizable because allegation of procedural defect, i.e., a biased hearing officer, would result in
6 an automatic reversal of prison disciplinary sanction). *Heck* also applies to proceedings that call
7 into question the fact or duration of parole or probation.
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9 Plaintiff's action, if successful, would necessarily imply the invalidity of his community-
10 custody related confinement. However, Plaintiff has not established that his re-incarceration has
11 been invalidated on appeal, by a habeas petition, or through some similar, favorable proceeding.
12 *See Edwards*, 520 U.S. at 646. The exclusive remedy for a state prisoner who challenges the fact
13 or duration of his confinement and seeks immediate or speedier release is a writ of habeas
14 corpus. However, prisoners in state custody who wish to challenge the length of their
15 confinement in federal court by a petition for writ of habeas corpus are first required to exhaust
16 state judicial remedies, either on direct appeal or through collateral proceedings (by filing a
17 personal restraint petition). Plaintiff must first present each and every issue he seeks to raise in
18 federal court in the Washington Court of Appeals and the Washington Supreme Court. *See* 28
19 U.S.C. § 2254(b)(c); *Granberry v. Greer*, 481 U.S. 129, 134 (1987); *Rose v. Lundy*, 455 U.S. 509
20 (1982); *McNeeley v. Arave*, 842 F.2d 230, 231 (9th Cir. 1988). State remedies must be
21 exhausted except in unusual circumstances. *Granberry, supra*, at 134. If state remedies have not
22 been exhausted, the district court must dismiss the petition. *Rose, supra*, at 510; *Guizar v.*
23 *Estelle*, 843 F.2d 371, 372 (9th Cir. 1988). As a dismissal solely for failure to exhaust is not a
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1 dismissal on the merits, *Howard v. Lewis*, 905 F.2d 1318, 1322-23 (9th Cir. 1990), it is not a bar
2 to returning to federal court after state remedies have been exhausted.

3 There is no allegation that Plaintiff's current conviction has been invalidated by a court of
4 executive order. Therefore, any judgment in his favor in this case would necessary imply the
5 invalidity of his sentence, as the logical consequence of such a judgment would be an earlier
6 release from prison. Accordingly, Plaintiff's claim must first be considered in a state petition for
7 habeas corpus and the claim must be appealed through all levels of the state appellate courts
8 before it can be brought in the federal district court for review.

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10 Plaintiff is **ORDERED** to show cause why the Court should not dismiss this case.
11 Plaintiff must file a response with this Court on or before **November 22, 2013**. If he fails to do
12 so, the Court will recommend dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915
13 and the dismissal will count as a "strike" under 28 U.S.C. § 1915(g). Pursuant to 28 U.S.C. §
14 1915(g), enacted April 26, 1996, a prisoner who brings three or more civil actions or appeals
15 which are dismissed on grounds they are legally frivolous, malicious, or fail to state a claim, will
16 be precluded from bringing any other civil action or appeal *in forma pauperis* "unless the
17 prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).
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20 **DATED** this 31st day of October, 2013.

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23 Karen L. Strombom
24 United States Magistrate Judge
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